IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07/03/2003

CORAM

THE HONOURABLE MR. JUSTICE K.P.SIVASUBRAMANIAM

WRIT PETITION No.39661 OF 2002
and
W.P.M.P.No.59402 OF 2002
and
W.V.M.P.No.1688 OF 2002

K. Murali .. Petitioner

-Vs-

1. The Commissioner (Excise) cum Secretary
to Government (Revenue),
Government of Pondicherry.

2. The Deputy Commissioner (Excie),
Pondicherry.

3. Kalyani .. Respondents

Petition filed under Article 226 of the Constitution of India
for the issue of a writ of mandamus as stated therein.

For petitioner : Mr.K.Kannan

For respondents 1 & 2 : Mr.T.Murugesan
Senior Govt. Pleader
for K.K.Sashidharan,
Addl. Govt. Pleader (Pondicherry)

For 3rd respondent : Mrs. Radha Gopalan.

:ORDER

By consent of all parties, the writ petition itself is taken up for hearing after hearing the petitioner in W.V.M.P.No.1688 of 2002 (petition to vacate the order of interim injunction) filed by the third respondent herein.

2. The petitioner's father was a licensee for running wine shop at Madagadipat commune Panchayat. The petitioner was a partner with his father and after his father's death, he was managing the shop as authorised by the Panchayat. According to him, it is a small village consisting of 5000 persons and there are two other retail wine shops with bar and one retail shop without bar. The third respondent claims to be a licensee of a wine shop at Mahe which is more than 650 K.Ms. from Pondicherry and he appears to have applied to the second respondent for the transfer of the said licence to Madagadipat at Pondicherry. On coming to know of the said attempt and also finding that the shop was to be located near the temple, the people in the village felt outraged and the petitioner also joined with them protesting against the grant of licence in that place by petitioning to the higher officials. With the result, the petitioner has sought for the issue of a writ of mandamus directing respondents 1 and 2 to forbear the third respondent from establishing or running a wine shop at Survey No.5/1 at National Highways 45A, Villupuram-Pondicherry Main Road, Madagadipat village, Pondicherry State.

3. In the counter filed by the second respondent, it is contended that the petitioner is objecting to the location of the shop by the third respondent mainly on two grounds. Firstly, that it is to be located within the prohibited distance from public place like place of worship and educational institution and secondly, it was in violation Rule 209 of the Pondicherry Excise Rules (hereinafter called the Rules) dealing with shifting/transfer of licensed premises from one place to another. It is submitted that the Deputy Commissioner Excise, Mahe had sent proposals which were received from M/s.Urvasi Bar, Mahe, the third respondent being the holder of FL-2 licence, for permission to shift their business from Mahe to Madagadipet. The Union Territory of Pondicherry comprised of four regions viz., Pondicherry, Karaikal, Mahe adjacent to Kerala and Yanam adjacent to Andhra Pradesh. The Pondicherry Excise Act and Rules do not prohibit such shifting from one Region to another. Rule 209 has also been amended enabling the authority to permit shifting subject to the licensee fulfilling the conditions thereon. Hence, in terms of the amendment, it is within the powers of the Licensing Authority to permit such shifting in the interest of the third respondent, was permissible. On the second objection of the selected spot being within the prohibited distance, it is stated that the said provision was operative only "as far as possible" and that the shop of the petitioner himself was located only within the same radius of prohibited distance. The shop of the petitioner was located within 50 metres from the

proposed shop of the third respondent.

4. The third respondent has also filed a counter and apart from the grounds stated in the counter of the second respondent, it is stated that she sought for shifting as she happens to be a resident of Pondicherry which was only 20 K.Ms. away from Madagadipat. The shop at Mahe was closed after paying necessary fees for shifting the shop as required under Rule 209 of the Rules. The shifting was ordered by respondents 1 and 2. Only after making detailed enquiries, the application was accepted. The villagers have also stated that they have no objection for the location of the shop in the proposed site. Though originally, the person administering Jumma Masjid had objected, after ascertaining the shop was to be located at a far away place, had given a letter on 31.10.2002 to the effect that they have no objection. It is further stated that the writ petition has been filed even before the grant of approval. The petitioner's shop is also located near Om Sakthi temple. There is no temple or mosque within the prohibited distance. There is no prohibition under Rule 209 of the Rules, to shift a shop from one area to another area. She has invested about Rs.50,000/- towards the fee prescribed for transfer and hence she is being put to unnecessary loss. The writ petition has been filed at the instance of owner of an existing wine shop and hence the same was not maintainable.

5. Learned counsel for the petitioner apart from raising the contentions stated in the affidavit took me through the Rules in support of his contentions that shifting which is contemplated under Rule 209 was only within the same area and not from one area altogether different to another area which does not fall within the same excise area/ Panchayat commune. Location or number of shops and the lease amount to be paid by the licensees are considered and fixed on the basis of population in the area and the investment is made with the hope of a minimum business and the Government cannot increase the number of shops to the detriment of the existing shop owners. The proposed site was definitely within the prohibited distance from place of worship and hence not permissible.

6. Mrs. Radha Gopalan, learned counsel for the third respondent contends that shifting from one area to another was permissible automatically under Rule 209 of the Rules, subject only to the condition that prior permission should be obtained. There is no area restriction in the Pondicherry Union Territory. There is no ceiling on the shops as in Tamil Nadu and hence the objection by the petitioner was not sustainable. The writ petition at the instance of a rival trader, is motivated and such a writ petition cannot be entertained. Reliance is placed on the judgment of the Supreme Court rendered in the context of the locus standi of the objectors in the grant of licence for locating Rice Mills.

7. Learned Government Pleader, (Pondicherry) also contended that there was no rule which visualise prohibition of transfer of any shop from one area to another. There is no basis for the contention that the proposed site was within the prohibitory distance from any place of worship or educational institution.

8. In reply, learned counsel for the petitioner submits on the question of locus standi and refers to the judgment of the Supreme Court in M.S.JAYARAJ v. COMMR. OF EXCISE (2000 (7) S.C.C., 552) which will be discussed later.

9. The first issue to be considered is as to whether shifting a shop from one area to another is permissible and whether at Pondicherry Union Territory, there is no ceiling on the number of shops so as to enable a rival trader to object to the location of an additional shop. The following are two relevant rules:

"Rule 163. Shifting of the shop. - The Licensing Authority may either on the application of the licensee or otherwise and for reasons to be recorded in writing, direct the shifting of a shop from one place to another and a licensee shall not be entitled to any compensation on account of such shifting."

Rule 209. Shifting of shops. - The licensee shall not shift the licensed premises from one place to another without the prior approval of the Licensing Authority."

10. In the counter filed by the Government, it is stated that by an amendment which came into force on 31.05.2002, a proviso was added Rule 209 to the effect that the Licensing Authority may permit subject to the fulfilment of the conditions of the licence, shifting of licensed premises on payment of one fourth of licence fees for such shifting.

11. On a reading of both the Rules, it would appear that shifting is made possible on complying with the required conditions. But the expression used in both the Rules is "from one place to another". It has to be examined as to whether the expression "place" can be treated as different from "area" as contended by the petitioner. On an analysis of the provisions under the Act and Rules, I am unable to accept the contentions that Pondicherry Act and Rules do not contemplate ceiling on number of shops to be located and that there are no areawise restriction in the grant of licence for the following reasons:-

Section 16 of the Pondicherry Excise Act (hereinafter called "the

Act") deals with the power to grant lease of right to manufacture Indian Liquor or any intoxicating drug or sale by wholesale and retail within any specified area. Under Section 70 of the Act which confers Rule making power; Clause (d) contemplates regulating the periods and localities in which licences for the wholesale or retail sale of any intoxicant may be granted and for regulating the number of such licences which may be granted in any local area. The expression "local area" should naturally mean only the locality or the Panchayat/Commune area or Ward in a Municipality. It cannot certainly mean the entire Union Territory of Pondicherry.

12. Now coming to the Rules, Rule 122 is as follows:-

"122. Number of licences to be fixed:- (1) The maximum number of licences to be granted in an area shall be determined from time to time by the Excise Commissioner with the previous approval of the Government."

(2) While fixing the number of licences for the year, regard shall be had to the General policy of the Government from time to time the existing number of shops and other relevant factors."

13. Under Rule 144 of the Rules, lease of the right of retail vending by auction has to be ordered only after issuing a notification containing all particulars including names of the shops of liquors to be disposed of and the boundary.

14. Reasons as to why the area has to be specified are not far to seek. Huge amounts are collected from the bidders towards licence fee, lease amount, privilege fee and with assured of minimum business in order to ensure collection of minimum revenue to the State and for the purpose of assuring the payment of the lease amount, recovery thereof, immovable property security or by mortgage is insisted upon as prescribed under the Rules. Condition No.10 attached to Form FLI licence requires the licensee to ensure proper business failing which loss of revenue accruing to the Revenue becomes recoverable as land revenue.

15. The above quoted provisions are sufficient to indicate that there is no difference between the conditions under which such shops are leased as between Tamil Nadu and Union Territory of Pondicherry. It is no doubt, true that as in Tamil Nadu and in Pondicherry also under Rule 161 of the Rules, the Government has power to increase or to reduce the shops. But such a power cannot be arbitrarily or capriciously exercised unmindful of causing loss to the existing licensees. In fact, the very power under Rule 161 of the Rules visualises fixing of number of shops for the locality and disproves the contention of learned counsel for the third respondent that there are no restrictions at Pondicherry. In fact, that is not even the stand of the Pondicherry Government in their counter affidavit, in which they have dealt with only their power to permit shifting of the shops. Therefore, I am unable to sustain the contention that such restrictions are not contemplated under the Pondicherry Act and Rules. It may be that in certain localities of Pondicherry Union Territory, Excise Authorities are not complying with the statutory requirements. It is needless to state that executive default cannot

override the legislative requirements. The above conclusion will have the consequential impact on the next issue which arises for consideration namely, whether there can be shifting of a shop from one place to another. When once it is held that each locality or Panchayat/Commune can have only a specified number of shops, no shifting can be permitted in favour of a licensee from a totally different area. We have to consider Rules 163 and 2 09 of the Rules which are relied on by the respondents 1 and 2 as enabling the shifting of shops and the said Rules have already been extracted above. While Rule 163 deals with liquor shops, Rule 209 deals with arrack shops. In the counter, it is stated that a proviso had been added to Rule 209 as mentioned above by amendment which came into effect from 31.5.2002. I have not been informed of any similar amendment to Rule 163 dealing with liquor shops. Even so, the amendment is of no consequence as it adds only a further condition of payment of one-fourth of licence fee for shifting.

16. Rules 163 and 209 of the Rules undoubtedly permit the licensee to seek for shifting of the shop from one place to another only with the approval of the authority. What is meant by "place" which word has not been defined, has to be interpreted in the background of the provisions which I have already dealt with earlier. As I had already concluded that the auction of the lease can be complied with only on the basis of a specified local area, it has to necessarily follow that any shifting under Rules 163 and 209 can be only within a specified local area. Shifting or transferring a shop from an area to a totally different area would only result in the increase in the number of shops in the transferee place which cannot be done under Rule 163 or Rule 209 of the Rules. Even while exercising the power under Rule 161 which enables the increase or reduction of number of shops, it can be done only after specific sanction by the Government. Therefore, the Licensing Authority cannot order shifting under Rule 163 or Rule 209 of the Rules, which has the result of increasing the number of shops in the transferred area.

17. The above discussion confirms the position that the expression "from one place to another" can only mean within a particular local area/Panchayat/commune and will not enable shifting from a totally different area.

18. On the question of locus standi of the petitioner, it is true that the petitioner is a rival trader. Reliance placed on the judgment of the Supreme Court rendered in the context of the proceedings initiated by rivals in Rice Mill industry may not be appropriate considering the latest pronouncement of the Supreme Court in M.S.JAYARAJ V. COMMR. OF EXCISE (2000 (7) S.C., 552). The Supreme Court had considered the issue in detail after elaborate discussion of the earlier judgments including the judgments rendered in cases relating to location of Rice Mill and also in the specific context of shifting of liquor shops and has held as follows:-

"In this context we noticed that this Court has changed from the earlier strict interpretation regarding locus standi as adopted in Nagar Rice & Flour Mills v. N.Teekappa Gowda & Bros. (1970 (1) S.C.C., 575) and Jasbhai Motibhai Desai v. Roshan Kumar (1976 (1) S.C.C., 671) and a much wider

canvass has been adopted in later years regarding a person's entitlement to move the High Court involving writ jurisdiction. A four-Judge Bench in Jasbhai Motibhai Desai pointed out three categories of persons vis-a-vis the locus standi: (1) a person aggrieved; (a) stranger; and (3) a busybody or a meddlesome interloper. Learned Judges in that decision pointed out that anyone belonging to the third category is easily distinguishable and such person interferes in things which do not concern him as he masquerades to be a crusader of justice. The judgment has cautioned that the High Court should do well to reject the petitions of such busybody at the threshold itself. Then their Lordships observed the following: (SCC P. 683, para 38)
" 38. The distinction between the first and second categories of applicants, though real, is not always well demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrigugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of 'persons aggrieved'. In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be 'persons aggrieved.'

"13. A recent decision delivered by a two-Judge Bench of this Court (of which one of us is a party Sethi,J.) in Chairman, Railway Board v. Chandrima Das (2000 (2) S.C.C., 465) after making a survey of the later decisions held thus (SCC pp.478-79, para 17).
"17. In the context of public interest litigation, however, the Court in its various judgments has given the widest amplitude and meaning to the concept of locus standi. In People's Union for Democratic Rights V. Union of India ((1982 (3) S.C.C., 235) it was laid down that public interest litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to court. (See also Bandhua Mukti Morcha v. Union of India (1984 (3) S.C.C., 161) and State of H.P. v. A Parent of a Student of Medical College (1985 (3) S.C.C., 169) on the right to approach the court in the realm of public interest litigation.) In Bangalore Medical Trust v. B.S.Muddappa (1991 (4) S.C.C., 54) the Court held that the restricted meaning of aggrieved person and the narrow outlook of a specific injury has yielded in favour of a broad and wide construction in the wake of public interest litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rending great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on a technical or conservative yardstick of the rule of locus standi or the absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its stride anyone who is not a mere ' busybody'.
"14. In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, we do not wish to nip the motion out solely on the ground of locus standi. If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the

range (for which auction was held) and have his business in another range it would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no locus standi. So We proceed to consider the contentions on merits."

19. In the result, the objection based on locus standi cannot be entertained. As pointed out earlier, the location of the shop has a vital role to play in the matter of income of the lessee who has the obligation and necessity to turn out minimum business, failing which he is answerable for any loss of revenue and the recovery of the same as against his property under the Revenue Recovery Act. He is also required to furnish immovable security by mortgage as a pre-condition for the licence. Therefore, to say that he has no locus standi to raise objection is no longer a valid defence.

20. On the issue of the third respondent's site being within the prohibited distance, through that the respondents 1 and 2 claim that the proposed site is not within any prohibited distance from any place of worship or school, the second respondent has not made any positive statement. The counter by the second respondent is not only vague, but also states that the Rule imposing the said condition is to be applied only "as far as possible" and that the shop of the petitioner himself was within the prohibited distance. Such defences are not to be expected from the State. The Rule is one which requires to be strictly implemented by the State in the interest of the public. If the petitioner's shop is located in violation of the said Rule, action has to be taken against the petitioner also. The Government cannot be heard to plead that they have allowed the petitioner to violate the Rule and therefore, the third respondent can also be allowed to violate the Rule.

21. In the result, the petitioner is entitled to succeed and the writ petition is allowed. No costs. Connected miscellaneous petitions are closed as unnecessary.

Index: Yes.
Internet : Yes.

sai/-

To

1. The Commissioner (Excise) cum Secretary
to Government (Revenue),
Government of Pondicherry.
Pondicherry.

2. The Deputy Commissioner (Excie),
Pondicherry.